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No. 88-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE INC.,

Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF[1]

The briefs of respondents and their *amici* confirm that the Fifth Circuit's ruling is a departure from settled abstention principles. They concede that the decisions of this Court (and the nearly uniform decisions of courts of appeals) have upheld federal equitable relief against state utility proceedings or orders preempted by federal statutes and rejected claims that federal claimants should be remitted to state judicial or administrative remedies in such cases.[2] And respondents concede that a federal court's responsibility in cases raising such threshold preemption claims is to "undertake a very limited assessment of the alleged federal [preemption] bar to determin whether it is 'direct' or 'facial' and dispositive" and to abstain only if the court concludes it is not. Resp. Br. 30; *see id.* 25. In that circumstance, the issue cannot be held to be "predominantly local" under *Burford* and the proceed-

[1]The Statement Required By Rule 28.1 appears at page ii of the Petition For Certiorari.

[2]*Compare* Respondents' Brief ("Resp. Br.") 25-28 and Amicus Brief of National League of Cities, *et al.* ("NLC Br.") 25-26, *with* Petitioner's Brief ("Pet. Br.") 24-26.

ing cannot be found to further "legitimate state interests" under *Younger*, without implicitly rejecting the federal preemption claim on the merits. *See Knudsen Corp.* v. *Nevada State Dairy Commission*, 676 F.2d 374, 377 (9th Cir. 1982).

The complete answer to respondents and their *amici* is that the Fifth Circuit did *not* apply the standard that respondents concede to be required by settled law (and that petitioner and the Solicitor General urge).[3] The Fifth Circuit did not make a "preliminary assessment" that NOPSI's preemption claim was not "facial, direct, or 'readily apparent' and, of course, dispositive." Resp. Br. 25. To the contrary, the Fifth Circuit not only assumed that a valid such preemption claim was presented (Cert. App. 11A), but also stated that the "language of [*MP&L*] seems to foreclose" the Council's inquiry into "NOPSI's asserted imprudence in failing to resell the [Grand Gulf 1] power." Cert. App. 13A.

In short, the application of respondent's own test requires that the Fifth Circuit's abstention judgment be reversed and the case be remanded for decision of the merits of the preemption claim.

Nevertheless, respondents and their *amici* seek to defend the Fifth Circuit's judgment. Their arguments ultimately rest on two principal grounds. First, they urge a radical expansion of the scope of abstention in which a state's "adjudicatory" interest in "setting its own house in order" would be sufficient under *Younger* to require that all federal challenges to municipal or state administrative actions be channelled through state courts. This is nothing less than a proposal that this Court overrule decades of § 1983 and other decisions and destroy the federal district court's role in the vindication of federal rights against state action. Second, respondents make a series of irrelevant and erroneous arguments regarding the merits of NOPSI's preemption claim.[4]

[3]There is no material difference between respondents' standard and the Solicitor General's standard that the federal court determine whether the federal preemption claim is "substantial and would be dispositive of the merits of the lawsuit." SG Br. 23.

[4]In this regard, Respondents' Brief is pervaded with erroneous and inflammatory "factual" assertions. NOPSI will not respond to these because they are irrelevant to the abstention issue.

I. The Fifth Circuit's Preemption Decision Cannot Be Upheld Unless The Court Holds That The State's "Adjudicatory" Interest Overrides A Federal Claimant's Right To Litigate Federal Claims In Federal Courts.

Respondents and NLC each contend that NOPSI's abstention argument must rest on a premise that Louisiana state courts are biased or incapable of deciding federal preemption claims quickly and correctly. *See* Resp. Br. 23; NLC Br. 19 n.12. This is simply false. Neither NOPSI nor the United States has made such a claim. The basis for our contentions, rather, is that Congress gave federal claimants a right to challenge state action in federal district courts for compelling reasons and that neither *Younger* nor *Burford* provides any basis for denying NOPSI's right to choose a federal forum to raise its federal preemption claim.

Indeed, Respondents' Brief demonstrates that the availability of a federal forum has critically important consequences for the implementation of statutes like the Federal Power Act and the protection of federal rights.[5] The fact is that NOPSI and two other MSU operating companies could not obtain the rate relief (to which they were later held to be entitled in *MP&L*) until *after* federal district courts agreed to hear the federal preemption and Commerce Clause claims.[6]

[5]Respondents state that they agreed to the March, 1986 rate settlement that recognized NOPSI's FERC-mandated Grand Gulf 1 expenses only after the initial Fifth Circuit holding in *NOPSI I* that abstention was improper and that "[i]f anyone was 'forced' then to settle by an abstention decision, it was the Council." Resp. Br. 32. This is an admission that, but for the Fifth Circuit's initial decision against abstention, NOPSI might not have obtained any Grand Gulf relief (other than minimal fuel costs savings) to this day and been long ago driven into bankruptcy.

[6]Just as NOPSI obtained no such relief until a federal forum was held to be available, MP&L and AP&L were unable to obtain any Grand Gulf relief from their state commissions until after federal actions were brought and federal courts set hearings on their federal preemption claims. *See Mississippi Power & Light Co.* v. *Mississippi Public Service Comm'n*, No. J85-0792(L) (S.D. Miss.); *Arkansas Power & Light Co.* v. *Arkansas Public Service Comm'n*, No. LR-C-85-571 (E.D. Ark.); *see*

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It is because the availability of a federal forum can have such importance that Congress refused to rely on state courts to vindicate federal rights and constituted the lower federal courts as " 'the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' " *Steffel* v. *Thompson*, 415 U.S. 452, 464 (1974) (citations omitted) (emphasis in original). It is for this same reason that this Court has repeatedly held that abstention is an "extraordinarily narrow" exception to the virtually "unflagging obligation" of federal district courts to exercise the federal question jurisdiction conferred by Congress. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). The Fifth Circuit's decision to create such an exception here is contrary to both *Younger* v. *Harris* and *Burford* v. *Sun Oil Co.*, and would severely impair § 1983 litigation and the implementation of important federal statutory schemes.

A. There Is No Basis For Abstention Under *Younger* v. *Harris*.

In defending the Fifth Circuit's abstention decision, respondents and their *amici* now rely almost exclusively on the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971).[7] They concede that *Younger* abstention is not proper unless the exercise of federal equity jurisdiction implicates state interests that are determined by the federal court to be "legitimate" and "important." The reason is that, absent such an interest, there is no possibility that allowing the state proceeding to go forward would permit the state to offer a "narrowing construction" or otherwise "mediate" between legitimate state and federal interests. Resp. Br. 19; Pet.

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Arkansas Power & Light Co. v. *Missouri Public Service Comm'n*, 829 F.2d 1444 (8th Cir. 1987). Federal courts had previously held that neither *Younger* nor *Burford* authorized federal court abstention over these federal claims. *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985).

[7]Although the Fifth Circuit's decision rests primarily on *Burford*, respondents have not made an independent *Burford* argument, but treat *Burford* as a "special case of comity-based abstention" under *Younger*. Resp. Br. 20.

Br. 30 n.32; *Moore* v. *Sims*, 442 U.S. 415, 429-30 (1979).[8] Respondents and *amici* claim that two such legitimate state interests are present here, but neither claim possesses any substance.

1. The State's Generalized Interest In Retail Ratemaking Cannot Justify *Younger* Abstention.

The only substantive interest that respondents and *amici* identify is the state's generalized interest in regulating local utilities and setting retail rates.[9] NLC Br. 9-10; Resp. Br. 21. But that

[8]Contrary to NLC's arguments (NLC Br. 11-12), the *Younger* exception for patently unconstitutional statutes that are incapable of valid application (*Younger*, 401 U.S. at 53-54) proceeds from this same premise. If a state pursues an otherwise "legitimate" interest by instituting a proceeding under an incurably invalid statute, there is no "opportunity for narrowing constructions that might obviate the constitutional problem" and no need to permit the state proceeding to go forward. *Moore* v. *Sims*, 442 U.S. 415, 429-30 (1979).

NOPSI here has argued both (1) that the Council cannot be held to have a "legitimate interest" in the prudence review without deciding the merits of NOPSI's preemption claim (Pet. Br. 32-34) and (2) that the Ordinance instituting the prudence review and the Council's Order are, in any event, "incapable of valid application" because they invade FERC's exclusive jurisdiction (Pet. Br. 35-38). Contrary to NLC's contention, therefore, NOPSI's arguments would not allow federal courts to "pretermit state lawsuits whenever a state agency or trial court made what was purported to be a plain error of federal law." NLC Br. 12.

[9]Respondents and their *amici* recognize that the Council's prudence investigation and ratemaking proceedings are concluded, but they contend that review of a municipal rate order in a state court of general jurisdiction should be deemed a continuation of the earlier utility proceeding for *Younger* purposes. *See, e.g.*, Resp. Br. 31 ("The Council's own ratemaking and prudence inquiry, even though complete, constitutes an 'ongoing proceeding' because it is subject to state judicial review"). In respondents' view, when the state had a "legitimate interest" in instituting a coercive administrative or legislative proceeding, then that same interest bars a federal court challenge after final administrative action is taken and the only question is where "remedial" judicial review proceedings may be instituted.

This contention is unsustainable, and has been repeatedly rejected by this Court. *See* pp. 10-14, *infra*. It would require a radical incursion into the jurisdiction of federal courts—and destroy § 1983 litigation—if the availability of review of final nonjudicial action in state courts could,

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interest is not in issue here. Petitioner has *not* sought to enjoin the City from determining NOPSI's retail rate base and rate of return, establishing NOPSI's non-Grand Gulf operating expenses, determining how Grand Gulf 1 expenses should be phased-in, or "choosing among rate structures." NLC Br. 5. To the contrary, the Council exercised this legitimate authority in its March, 1986 rate ordinance (*see* Pet. Br. 9), and NOPSI has neither challenged any aspect of this rate order nor sought to interfere with the Council's ability to perform any of these legitimate state ratemaking functions in the future. *See* Pet. Br. 27.

Rather, NOPSI's sole claim is that the Council's ratemaking order is preempted in the one limited respect recognized in this Court's decisions in *MP&L* and *Nantahala*: that the Federal Power Act requires the Council to include NOPSI's Grand Gulf 1 expenses in retail rates and prohibits the Council from "undertak[ing] a prudence review for the purpose of deciding whether to enter" "an order 'trapping' the costs [NOPSI] is mandated to pay" by FERC. *MP&L*, 108 S. Ct. at 2439. Indeed, the precise holding of *MP&L* is that when, as there and as here, a retail rate order is entered that includes Grand Gulf 1 expenses, the Federal Power Act preempts the state from instituting a separate proceeding to investigate the prudence of those costs and to "roll back" the rates by "trapping" FERC-mandated costs. *Id*. In short, the Court's holding in *MP&L*—and NOPSI's claim here—is that a state prudence review of Grand Gulf 1 expenses is wholly outside state authority under *Nantahala*, *MP&L*, and the Federal Power Act, and cannot serve a legitimate purpose.[10]

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under *Younger*, close federal courts to federal claimants. However, the issue does not have to be reached in this case because the Council could not be held to have a "legitimate" interest at any stage of the administrative or judicial proceedings: any such "interest" is preempted by the Federal Power Act.

[10]NLC thus misstates the issue in asserting that NOPSI is claiming that the Council committed a mere "error" of federal law in a proceeding that the Council had authority to conduct. NLC Br. 18. NOPSI's claim here is that the prudence investigation was itself a violation of federal rights and that the Council had no authority either to conduct it or enter any coercive order.

That a state cannot defeat federal jurisdiction over such threshold preemption claims by asserting a generalized interest in "utility regulation" or "ratemaking" is established by this Court's many decisions upholding the exercise of federal equity jurisdiction against state utility proceedings and orders preempted by federal statutes.[11] These decisions teach that the focus of the abstention or exhaustion inquiry is on whether any legitimate interest can be served in the *particular* state proceeding on which the argument for abstention is based. Indeed, when such threshold preemption claims are presented, this Court has not abstained under *Younger* without first deciding that the initiation of the particular state proceeding at issue did not itself violate federal rights, but could serve legitimate state interests. *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619, 628 (1986); *see* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1435 (3d Ed. 1988) (*Dayton* decided First Amendment challenge to state administrative jurisdiction "on the merits").[12] Otherwise, a

[11]*See, e.g., Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943); *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534 (1958); *City of Chicago* v. *Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77 (1958).

[12]Respondents and their *amici* do not dispute that *Dayton* rejected the constitutional challenge to the state equal employment commission's investigatory jurisdiction on the merits, and that this aspect of the decision was necessary to its holding that the administrative proceeding promoted important and legitimate state interests. However, respondents (Br. 30) and NLC (Br. 16) rely on the fact that *Dayton* and other decisions reject "the argument that a constitutional attack on state procedures themselves '*automatically* vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.' " *Dayton*, 477 U.S. at 628 (*quoting Moore* v. *Sims*, 442 U.S. at 427 n.10) (emphasis added); *see Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Juidice* v. *Vail*, 430 U.S. 327 (1977).

This misses the point. Petitioner does not claim that attacks on state procedures "*automatically*" eliminate any *Younger* bar. In any such case, the Court must address and decide whether the challenged state procedures can serve legitimate state interests and whether allowing the state proceeding to go forward thus permits "mediation" between

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decision to abstain is an implicit decision rejecting the preemption claim on the merits. *See Knudsen Corp.* v. *Nevada State Dairy Comm'n,* 676 F.2d 374, 377 (9th Cir. 1982).

Amicus National League of Cities makes the incongruous argument that a decision to abstain is not an implicit rejection of a threshold preemption claim, but that a federal court will somehow be implicitly deciding that state regulation is preempted if it refuses to abstain. NLC Br. 18. This is simply incorrect.[13] Federal courts of appeals almost uniformly hold that "abstention or exhaustion" is improper when a "challenge to a state regulatory scheme asserts that the proceeding or regulation at issue is beyond the state's authority." *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Comm'n,* 824 F.2d 672, 673 (8th Cir. 1987). Yet these courts often reject the preemption claim on the merits after refusing to abstain. *See id.* at 674-76 (rejecting National Labor Relations Act preemption claim); *Kentucky W. Va. Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 837 F.2d 600 (3d Cir. 1988) (rejecting Natural Gas Act preemption claim on merits after previously holding abstention improper).

As the Solicitor General demonstrates, the inapplicability of *Younger* to challenges to the jurisdiction of state agencies is especially clear when the preemption claim arises under statutes like the Federal Power Act. Congress created FERC to determine the

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legitimate state and federal interests. When there is a threshold challenge to the state's "jurisdiction" to invoke the procedures (as there was not in *Trainor, Juidice,* or *Moore,* but as there is here), this requires a decision of that question.

[13]As NLC's arguments confirm, there is only one rule that would avoid the outcome that a decision on abstention implicitly decides the merits of the case: a holding that *Younger* abstention is required whenever "the federal claim may be presented to a competent state court." NLC Br. 18. NLC's argument thus underscores that the Fifth Circuit's judgment cannot be affirmed unless the Court repudiates four decades of prior decisions and holds that a state's "adjudicatory" interest in keeping "its own house in order" is sufficient to prevent federal claimants from litigating purely federal challenges to state action in federal courts. *See* pp. 10-14, *infra.*

"prudence" and proper allocation of interstate power pool costs because it determined, as had this Court before it, that the interests of states in these questions are inherently in conflict with one another; "uncontrolled regulation by the states" would mean that each individual state would seek to advance its respective local interests at the expense of its neighbors and "patently interfere with broader national interests."[14] State efforts to achieve these parochial objectives have, in recent years, ranged from attempts to order utilities to change their FERC schedules,[15] to direct attempts to use state retail ratemaking to shift costs to other states,[16] to orders (like that at issue here) that purport to affect only a single local utility, but that have consequences for an integrated multistate system, and each state served by it.[17]

As the Solicitor General demonstrates, *Younger* requires a balancing in which "both federal and state interests have to be taken into account" (*Trainor* v. *Hernandez,* 431 U.S. 434, 448 (1971) (Blackmun, J., concurring)), and that balance overwhelmingly favors federal court jurisdiction in preemption cases under statutes like the Federal Power Act. *See* SG Br. 20-23.

[14]*Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 377 (1983); *see FPC* v. *Southern California Edison Co.,* 376 U.S. 205 (1964); *Public Utils. Comm'n* v. *Attleboro Steam & Electric Co.,* 273 U.S. 83 (1927). Because states would have unavoidable incentives to advance "their respective local interests" at the expense of their neighbors, this Court held in *Attleboro* that state regulation of interstate wholesale electric transaction is a *per se* violation of the Commerce Clause. 273 U.S. at 89-90. In the Federal Power Act, Congress declined to overrule *Attleboro* legislatively—as it could have, *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U.S. 311 (1917)—and, instead, codified *Attleboro's* "bright line" test.

[15]*Massachusetts Department of Public Utilities* v. *United States,* 729 F.2d 886 (1st Cir. 1984).

[16]*Nantahala Power & Light Co.* v. *Thornburg,* 476 U.S. 953 (1986).

[17]It is no answer that, as in this case, affected states may agree that each should have independent regulatory authority to second guess FERC's allocation order. *See* NLC Br. 20. Indeed, the "common pool" problems that have led each state to prefer its own fora are what prompted Congress to provide for FERC as a neutral adjudicator.

In this regard, NLC is incorrect (Br. 16) that NOPSI and the Solicitor General are contending that abstention is improper in all federal preemption cases.[18] The determination depends on the nature of the preemption claim and its relationship to the pending proceeding. The point is that, here, NOPSI's preemption claim goes to the power of the Council to proceed at all and is dispositive of the entire state proceeding.

2. The State's Adjudicatory Interest In "Keeping Its Own House In Order" Cannot Justify *Younger* Abstention.

Respondents and their *amici* also defend the Fifth Circuit's abstention decision by relying on the "adjudicatory" interest that this Court has repeatedly stated to be insufficient to justify *Younger* abstention. *See* Pet. Br. 29. Specifically, they contend that the state has an interest in confining all federal law challenges to municipal or state administrative actions to state courts so that the state may "'set[ ] its own house in order.'"[19] And respondents and their *amici* contend that this general adjudicatory interest should now be held to be sufficient, under *Younger*, to deny federal claimants their right to pursue federal remedies against unlawful state action in federal district court. This contention has been rejected by a century of decisions of this Court, and respondents and their *amici* are advocating a rule that would destroy § 1983 litigation and end the federal court's historic role as the primary vindicators of federal rights.

Few propositions are better settled in our jurisprudence than that when a final municipal or state administrative action violates federal rights and is causing immediate injuries, injured parties have a right to pursue their claims in federal court, irrespective of whether there are state judicial remedies. That is the law under 42 U.S.C. § 1983. *Monroe* v. *Pape*, 365 U.S. 167, 172-87 (1961);

[18]That broader thesis, however, has been urged in Note, *The Preemption Dimension Of Abstention*, 89 Colum. L. Rev. 310 (1989).

[19]Resp. Br. 22 (relying on "state's interest in developing a system of review competent to vindicate federal rights arising in matters involving its own regulatory bodies") & 25 n.44 (state has "institutional interest in 'setting its own house in order,' through appellate review of its administrative agencies"); *see also* NLC Br. 9, 21-22 & n.16.

see also Patsy v. *Board of Regents*, 457 U.S. 496 (1982) (no requirement of exhaustion of state administrative remedies under § 1983).[20] That is also the rule when state administrative action is challenged in federal equity actions that are not based on § 1983. *Lane* v. *Wilson*, 307 U.S. 268, 274-75 (1939);[21] *City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24 (1934); *Bacon* v. *Rutland R.R. Co.*, 232 U.S. 134 (1914). There is no requirement that state judicial remedies be exhausted before federal challenges to municipal or state administrative or actions may be brought in federal court.

[20]There is no substance to respondents' argument (Resp. Br. 28) that § 1983 cases are inapposite here. First, *Younger* abstention is not only fully applicable to § 1983, but the doctrine has been developed almost exclusively in § 1983 cases. Second, although this case was not brought under § 1983, it is an open question whether it could have been. *See Golden State Transit Corp.* v. *City of Los Angeles*, No. 88-840, *certiorari granted*, 109 S.Ct. 1117 (February 21, 1989). Third, whether or not § 1983 is available, Congress clearly gave the federal district courts jurisdiction to issue "injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *see Golden State Transportation Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986). That grant of federal jurisdiction altered the relationship between the states and the nation with respect to these claims, in the same way that § 1983 did in cases cognizable under its provisions. *Compare* Resp. Br. 28, *with Zwickler* v. *Koota*, 389 U.S. 241, 245-46 (1967).

[21]*Lane* v. *Wilson* makes it explicit that conventional judicial review proceedings need not be exhausted before state administrative action is challenged in federal court on federal statutory grounds:

> "[T]he plaintiff [here] did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. . . . But the state procedure open for one in the plaintiff's situation has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies. . . . Barring only exceptional circumstances, . . . or explicit statutory requirements, . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts."

307 U.S. at 274-75 (citations omitted).

Respondents and NLC argue that their position is supported by *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). *See* Resp. Br. 22; NLC Br. 9, 21-22 & n.16. This is simply incorrect. *Huffman* reaffirmed the well-settled rule that state judicial remedies do not have to be exhausted in federal suits challenging administrative or municipal actions. 420 U.S. at 609-10 n.21, *citing Monroe* v. *Pape, supra; City Bank Farmers, supra,* and *Bacon* v. *Rutland R. Co., supra*.[22] *Huffman* held only that (apart from any *res judicata* bar) *Younger* required a federal district court to abstain in a suit seeking to enjoin enforcement of a state *court's* injunction because states have a legitimate substantive interest in enforcement of judgments of their courts.[23] *See also Pennzoil Co.* v. *Texaco, Inc.*, 481 *U.S.* 1 (1987); *Juidice* v. *Vail*, 430 *U.S.* 327 (1977).

Moreover, to overrule *Monroe* and its precursors now would, quite simply, destroy the role of the federal courts as the primary guarantors of federal rights against unlawful state action. If the state's interest in "setting its own house in order" were sufficient to invoke *Younger*, there would be literally no challenge to nonjudicial state action—under § 1983 or otherwise—that could

[22]The point was reiterated in *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), and *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). *Patsy* held that once state action is taken that injures a federal claimant, federal judicial remedies may be pursued, and there is no requirement that even nonjudicial state remedies be exhausted. *Patsy*, 457 U.S. at 516. In *Dayton Christian Schools*, the court distinguished *Patsy* and vacated an injunction against continuation of the state administrative investigation only because the administrative proceedings were "coercive, not remedial," and because the investigation itself did not violate any federal rights. *Dayton Christian Schools*, 477 U.S. at 627-28 n.2.

[23]All concede that the Council's prudence investigation was not itself judicial in character. Ratemaking proceedings are not judicial, but are "essentially a legislative function" (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 589 (1945)), and The Council of the City of New Orleans is, under any view, a legislative body. Thus, the argument that *Younger* applies here depends solely on the ground that the order entered in this legislative proceeding is reviewable in state courts of general jurisdiction. *See* Resp. Br. 19; *NOPSI I*, 798 F.2d 858, 864 (5th Cir. 1986); p. 5 n.9, *supra*..

be initially brought in federal district court. Cases as diverse as school desegregation suits and suits challenging ordinances violating First Amendment rights or federal statutes would all be barred under *Younger* because there would, invariably, be a right to obtain judicial review in state courts of general jurisdiction.[24] That would defeat the central purposes of § 1983 and of federal question jurisdiction.[25]

These considerations underscore why the Court has so long emphasized that an adjudicatory interest is insufficient to invoke *Younger*. They also underscore that, as the Solicitor General demonstrates, the state's "interest" in the judicial review proceedings now pending in the state courts would be insufficient to invoke *Younger* even if the Council had had a legitimate interest in undertaking the prudence review.[26] *See also* p. 5 n.9, *supra*.

[24]That there are no available limiting principles is confirmed by the facts of this case. Here, for example, no one claims that Council's prudence investigation and order was itself judicial in character. *See* p. 12, n.23, *supra*. There is no difference in principle between the disallowance order entered in this case and a municipal order conditioning renewal of a taxi franchise on the relinquishment of rights under the National Labor Relations Act (*see Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986)), or the actions of a school board maintaining a segregated school system. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979). To hold that a state's interest in "keeping its own house in order" prevents a federal court from adjudicating challenges to such nonjudicial state action would represent a radical incursion into the role of federal courts.

[25]As this Court has stated, the "legislative history [of 1983] makes evident that Congress . . . was concerned that state instrumentalities could not protect [federally created] rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972).

[26]*See* SG Br. 24-27. As the United States demonstrates, the Council's prudence investigation is now concluded and the question is not whether the prudence investigation should itself be enjoined. Rather, the question now is where NOPSI may bring suit to challenge the Council's coercive order on federal preemption grounds: in federal district court or in state court. The state review proceedings are not enforcement proceedings, but are "remedial." The state's interest in these judicial review proceedings, therefore, is "not appreciably greater than its inter-

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Finally, there is no substance to respondents' arguments that NOPSI's and the Solicitor General's position would require review of Council orders to proceed on "dual" litigation tracks. Resp. Br. 22. The theoretical possibility of dual review proceedings is a consequence of the rule that when Congress has granted concurrent jurisdiction, a plaintiff is free to bring suit in both state and federal forums for the same cause of action. *See Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 809 (1976). Here, however, as the Fifth Circuit found (Cert. App. 10A), the only reason NOPSI filed a petition for review in state court was the uncertainty over the availability of a federal forum. Such protective filings can create no *Younger* or other concerns. *See Kentucky W. Va. Gas Co.* v. *Pennsylvania Public Utilities Comm'n*, 791 F.2d 1111, 1117 (3d Cir. 1986).[27]

B. There Are No Grounds For *Burford* Abstention.

Respondents and their *amici* also argue that *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Alabama Public Service Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341 (1951), establish a general rule

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est in any private lawsuit in which state legislation may be subjected to a challenge on federal constitutional grounds." *Kentucky W. Va. Gas Co.* v. *Pa. Public Util. Comm'n*, 791 F.2d 1111, 1117 (3d Cir. 1986) (citation omitted).

In short, the state has no interest in NOPSI's privately-initiated pending review proceeding that is itself sufficient to justify *Younger* abstention, irrespective of whether Council had a legitimate interest in conducting the prudence investigation. And no one disputes the Solicitor General's showing that no other pending state court proceedings have any pertinence to the abstention inquiry. SG Br. 25-26 & n.21.

[27]Both NOPSI and the Solicitor General have argued that the District Court should not, in any event, have abstained from deciding NOPSI's request for a preliminary injunction (which was filed well before NOPSI made its protective filing in state court). Contrary to NLC's claim (NLC Br. 28), this contention was not rejected in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975). *Doran* did not rule on the question whether preliminary relief is separable from permanent relief for abstention purposes, and the Court's opinion has been criticized for that reason. *See, e.g.*, P. Bator, R. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1422-23 (3d Ed. 1988).

that federal courts may not entertain suits challenging an order entered in a state utility proceeding if judicial review is available in a state court. That is incorrect. The basis for *Burford* and *Alabama Public Service Comm'n* was that the utility orders had been challenged solely on federal Due Process[28] or state law grounds and that a federal district court resolution of those claims would have required the Court to examine and reweigh the *same* local factors that the state agency had considered—and that were further subject to *de novo* review in specialized state reviewing courts. Pet. Br. 26 n.28; SG Br. 11 n.10.[29] In this circumstance, federal court review would have inevitably disrupted the state's efforts to establish a coherent regulatory policy in an area in which Congress had left the states with primary regulatory authority.

[28]In arguing that *Alabama Public Service Comm'n* is applicable here, NLC contends, erroneously, that "the authority of the Interstate Commerce Commission under the scheme at issue . . . was strikingly similar to FERC's authority in administering the Federal Power Act." NLC Br. 23 n.18. This is simply wrong. The basis for the decision was that the ICC had taken no action that could have preempted the state order requiring the continuation of service, and the federal claim was based solely on the Due Process Clause of the Fourteenth Amendment. *See* 341 U.S. at 346 n.7 & n.9.

[29]Repondents state that courts of appeals "generally have not deemed" the presence of a specialized court to be a requirement of *Burford* abstention. Resp. Br. 20 n.30. This is incorrect. The majority of courts of appeals treat the presence of a specialized reviewing court as a precondition for *Burford* abstention. *Ada-Cascade Watch Co., Inc.* v. *Cascade Resource Recovery, Inc.*, 720 F.2d 897, 903 (6th Cir. 1983) (For *Burford* to apply, "the state must centralize review in a forum with special competence."); *accord J-R Distributors, Inc.* v. *Eikenberry*, 725 F.2d 482, 488 n.6 (9th Cir. 1984); *Association for Retarded Citizens* v. *Olson*, 713 F.2d 1384, 1390-91 (8th Cir. 1983); *Nasser* v. *City of Homewood*, 671 F.2d 432, 440 (11th Cir. 1982).

By contrast, only one of the three cases discussed by respondents even discusses the point, and it states only that centralized review is "not an *absolute* prerequisite" to *Burford* abstention. *Browning-Ferris, Inc.* v. *Baltimore County*, 774 F.2d 77, 80 (4th Cir. 1985) (emphasis added). Other Fourth Circuit decisions emphasize that the presence of centralized review is a critical factor under *Burford*. *Brandenburg* v. *Seidel*, 859 F.2d 1179, 1190-92 (4th Cir. 1988).

In contrast, even respondents and *amici* concede that this Court has repeatedly upheld the exercise of federal equitable jurisdiction against such utility proceedings or orders when the local body's authority was preempted by a federal statute. *See* p. 1 n.2, *supra* & p. 7 n.11, *supra*. These decisions reject claims that the considerations of comity and federalism underlying *Burford* required exhaustion of state administrative or judicial remedies or otherwise foreclosed federal court challenges.[30]

These cases clearly establish that when a local utility proceeding or order is challenged on the ground that it is preempted in its entirety by a federal statute, adjudication of that claim by a federal court cannot be "disruptive of state efforts to establish a coherent [regulatory] policy" and cannot unduly interfere with a legitimate state activity. *Colorado River*, 424 U.S. at 814.[31] For example, contrary to the numerous misstatements of respondents and their *amici*, a federal court injunction against the enforcement of the Council's order would be based on the ground that the Council has been deprived of any jurisdiction to disallow NOPSI's federally-mandated Grand Gulf 1 expenses and is required to include all those expenses in retail rates. "Local factors" will be irrelevant to the resolution of the preemption claim, and the federal court decision would have no implications for the development of state "prudence" policy in areas where state jurisdiction had not been preempted. To the contrary, the decision would simply rest on the ground that the only entity with jurisdiction to determine the prudence of the Middle South System's Grand Gulf 1 costs is FERC.

[30]Contrary to NLC's suggestion (NLC Br. 26-27), the doctrines of exhaustion of administrative or judicial remedies "simply address[ ] many of the same concerns which the various types of abstention are designed to reach." *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n* , 772 F.2d 404, 418 (8th Cir. 1985); *see Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 16 n.8 (1987); 4 K. Davis, Administrative Law Treatise § 25.1 at 350 (1983).

[31]These cases also foreclose respondents' argument (Resp. Br. 37-38) that the Johnson Act (28 U.S.C. § 1342) and the Anti-Injunction Act (28 U.S.C. § 2283) "evince unmistakable intent" that such federal preemption challenges to state utility proceedings "be channelled through state courts." The Court also there held that the Johnson Act is inapplicable to preemption challenges brought under federal statutes regulating interstate commerce, like the Federal Power Act. *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456, 469-70 (1943). And as respondents admit and each decision implicitly holds, a suit to enjoin an agency order is wholly outside the Anti-Injunction Act, which prohibits injunctions only against state *court* proceedings. *See* Resp. Br. 37-38. Respondents thus disclaim any intention to rely on the Johnson Act or the Anti-Injunction Act as a separate ground. Resp. Br. 38 n.59.

II. Respondents' Arguments On The Merits Are Irrelevant To The Abstention Question And Erroneous.

Contrary to the claims of respondents (Br. 18) and their *amici* (NLC Br. 13), NOPSI is not asking the Court to decide the merits of its preemption claim. The sole issue before the Court is whether the Fifth Circuit's abstention holding is erroneous, and NOPSI's opening Brief discussed the merits for the sole purpose of demonstrating that its preemption claim is, to say the least, substantial and that the Council's Order disallowing $135 million in Grand Gulf expenses is invalid on its face under *MP&L*. If the Court agrees that the Fifth Circuit's abstention judgment is erroneous, it should remand the case to the Fifth Circuit for decision of the merits of the preemption claim.

Nonetheless, respondents and NLC devote lengthy sections of their briefs to arguing the merits. Most of these arguments are devoted to rearguing claims that were raised and rejected in *Nantahala* and *MP&L*. *E.g.*, Resp. Br. 8-9 & 35-37. The rest simply ignore *MP&L*'s holding that, under the Federal Power Act, a state "may not bar regulated utilities from passing through to retail customers [these] FERC-mandated wholesale rates" and may not undertake *any* form of prudence investigation that would result in the "'trapping'" of any of these costs. *MP&L*, 108 S. Ct. at 2439; Pet. Br. 38. Yet that is precisely what the Council has done.

Respondents' Brief underscores the invasion of FERC's jurisdiction. As FERC found, NOPSI and other MSU companies are required to "operate[ ] as a single . . . coordinated system." 15 U.S.C. §§ 79b(a)(29), 79k(b); *see MP&L*, 108 S.Ct. at 2431. And

this Court has recognized that FERC implicitly found that the construction and completion of Grand Gulf 1 was a reasonable part of an MSU system plan to diversify fuel sources by acquiring nuclear and coal capacity to supplement its oil and gas-fired capacity. *MP&L*, 108 S.Ct. at 2431. Yet now the Council has disallowed $135 million in NOPSI's Grand Gulf 1 expenses on the ground that it was "imprudent" for NOPSI not to "diversify" risk in a different way: by selling off nuclear capacity and buying more coal capacity.[32] The Council's theory is that FERC can determine that Grand Gulf represented prudent planning for the MSU system as a whole, but that the five different state and local ratemaking bodies can revisit this issue and find, based on "local conditions," that individual MSU operating companies should have second-guessed the system's planning process,[33] anticipated FERC's allocation, and sought to nullify both. That is precisely what *MP&L* forbids. *See* 108 S.Ct. at 2441.

The Council's theory is especially meritless, moreover, because the $135 million disallowance depends on the ground that "prudent" NOPSI management would have made hypothetical wholesale purchases and sales of capacity in 1980 (which are subject to FERC jurisdiction)[34] and that FERC would, in 1985, have decid-

[32]The Council's finding that it was imprudent for NOPSI to fail to sell off Grand Gulf 1 nuclear capacity is simply a thinly veiled determination that the FERC allocated too much Grand Gulf capacity to NOPSI. The Council's determination is directly contrary to this Court's holding in *MP&L* that " . . . if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for." *MP&L*, 108 S.Ct. at 2440.

[33]Under the FERC-approved System Agreements, the decisions of whether and when to acquire new generating capacity must be made by a system-wide committee (including one representative from NOPSI and each other MSU operating company) on the basis of the needs of the MSU system as a whole. *See Middle South Energy, Inc.*, 31 FERC ¶ 61,305 at 61,646 (1985).

[34]Contrary to Respondent's misstatement, no claim is made that "once the power costs of Grand Gulf were properly allocated among the companies, the FERC would have any interest in *preventing* the

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ed that these sales should be permitted to reduce NOPSI's actual Grand Gulf 1 expense to the same 9% figure that FERC found would be unjust, unreasonable, and discriminatory in FERC Opinion 234. In short, the Council's arguments dramatically demonstrate that the $135 million disallowance rests on arguments that could have been presented to FERC in 1985, but were not.[35]

It is for these reasons that the Council, in the end, is forced to defend its prudence disallowance on the ground that it has not attempted "to *alter* the FERC interstate allocation of costs," but has merely set retail rates as if a different allocation had been made. Resp. Br. 41 (emphasis in original). However, that argument was rejected in *Nantahala*, and *MP&L* alike. *See* Pet. Br. 37 n.43. In short, it could not be clearer that NOPSI has presented a substantial preemption claim that is dispositive of all issues raised by the Council's Order.

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companies from making power resales." Resp. Br. 44 n.58 (emphasis in original). First, the hypothetical off-system sales that are the basis for the disallowance occurred five years *before* the power costs were allocated, and FERC would have thus taken any such sales into account in allocating costs among MSU companies (just as it took into account other off-system sales, *see* Pet. Br. 5 n.6). Second, even if NOPSI could sell 8% of Grand Gulf 1 off-system today—as the Council found it could not—the point is only that this would be a wholesale sale subject to FERC's exclusive jurisdiction, and FERC would then decide what effect that would have on NOPSI's Grand Gulf 1 costs: that is, whether it would produce a pro rata reduction in the costs of all MSU companies (such that NOPSI's allocation would be reduced by 1.36%) or a reduction in NOPSI's costs alone. *See* Pet. Br. 12 n.18.

[35]Respondents' assertion (Br. 43-44) that FERC would have then had no jurisdiction to consider the hypothetical 1980 transactions is unsupported and unsupportable. FERC has jurisdiction to consider any and all facts that bear on the whether and to what extent Grand Gulf 1 costs should have been included in MSE's rates and allocated to individual MSU companies.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the case should be remanded for decision of the merits of the federal preemption claim.

Respectfully submitted,

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